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No. 84-1233

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior properly terminated a 1926 Contract with petitioner that authorized it to operate the Newlands Reclamation Project, on the ground that petitioner violated operating criteria and procedures promulgated by the Secretary pursuant to authority expressly reserved in that contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 742 F.2d 527. The opinion of the district court (Pet. App. A11-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1984, and the petition for rehearing was denied on October 31, 1984 (Pet. App. A35). The petition for a writ of certiorari was filed on January 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an irrigation district organized under state law as a political subdivision of the State of Nevada. Within its territorial boundaries are

lands owned by farmers and others entitled to receive water from the Newlands Reclamation Project. Water for the Project is drawn from the Truckee and Carson Rivers. The Truckee River terminates in Pyramid Lake, "a desert lake 20 miles long and five miles wide, with no outlet and a water level determined by the balance or imbalance between inflow and evaporation." *United States* v. *Nevada*, 412 U.S. 534, 536 (1973). Newlands Project water is diverted from the Truckee at Derby Dam, upstream from Pyramid Lake, and conducted through the Truckee Canal to Lahontan Reservoir on the lower Carson River. There, the "combined waters of the Truckee and Carson Rivers * * * are distributed for irrigation and related uses on downstream lands by means of lateral canals within the Newlands Reclamation Project." *Nevada* v. *United States*, 463 U.S. 110, 116 (1983). Pyramid Lake and adjacent lands comprise the Pyramid Lake Indian Reservation, which was established in 1859 and is currently occupied by the respondent Pyramid Lake Paiute Tribe of Indians.

Rights of Newlands Project water users to Truckee River waters are governed by the *Orr Ditch* decree, the final decree entered in 1944 in *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944). See *Nevada* v. *United States*, 463 U.S. at 116-118. Under the *Orr Ditch* decree, the amount of water allowed or used for irrigation shall not exceed 3.5 acre feet per acre (afa), after transportation loss, for bottom lands and 4.5 afa for bench lands (E.R. 38-39),[1] and no diversion is permitted except in the amount reasonably necessary for "economical and

[1] "E.R." refers to the Excerpts of Record filed by petitioner in the court of appeals.

beneficial use" (E.R. 115). Rights of the Project water users to Carson River waters now are governed by the *Alpine* decree, the final decree entered on December 18, 1980 in *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir. 1983), intervention granted and cert. denied *sub nom. Pyramid Lake Paiute Tribe of Indians* v. *Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983). That decree also provides for a maximum of 3.5 afa and 4.5 afa, provided such amounts are necessary for beneficial use. 503 F. Supp. at 881. However, when this suit arose, Carson River water rights were governed by a temporary decree entered in *Alpine* on March 24, 1950, which provided for a maximum irrigation water use of 2.92 afa. Tribe Supp. E.R. 211.

2. a. On December 18, 1926, as authorized by the Reclamation Act of 1902, 43 U.S.C. 371 *et seq.*, and by Sections 23 and 45 of the Omnibus Adjustment Act of 1926, ch. 383, 44 Stat. 641, 648, the United States, through the Secretary of the Interior, entered into a Contract with petitioner (Pet. App. A36-A74). That Contract provided for petitioner to manage and operate the facilities constructed by the United States that comprise the Newlands Project (Arts. 6-7, Pet. App. A44-A45) and for petitioner to assume the obligation (theretofore imposed on individual landowners entitled to receive Project water) to repay the United States for construction costs of the Project (Arts. 9-14, Pet. App. A48-A54; see also Pet. App. A145). Article 34 of the Contract provided (Pet. App. A66):

> The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules

> and regulations, and to add to and modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and [petitioner] hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

Similarly, in Article 7 of the 1926 Contract, petitioner agreed to operate the Project works and deliver water therefrom "in full compliance with the National Reclamation Laws, as said laws now exist or as they may hereafter be amended or supplemented, court orders and decrees, contracts heretofore entered into between the United States and various persons for the delivery of water, the terms and conditions of this agreement, [and] the rules and regulations of the Secretary now in force or hereafter promulgated" (Pet. App. A45). Article 32 empowered the United States, upon one year's notice, to terminate the contract for "breach of any of [its] * * * terms or conditions" (Pet. App. A65).

b. As provided in Article 34 of the 1926 Contract, quoted above, the Secretary, on August 26, 1966, published proposed rules in the Federal Register designed to guide the operation and control of the Project. 31 Fed. Reg. 11314. On February 21, 1967, the Secretary adopted final regulations. 32 Fed. Reg. 3091. The basic regulations were not challenged by petitioner or anyone else and remain in effect today. See 43 C.F.R. 418.1-418.5. The preamble to the regulations explains that the regulations "will initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake," in fulfillment of the United States' trust responsibility to the

Tribe. 43 C.F.R. 418.1(b). The preamble stresses, however, that the rules and regulations were "developed within the framework of agreements, decrees [*i.e.*, *Orr Ditch* and *Alpine*], understandings, and obligations of the United States or to which the United States is a party" (43 C.F.R. 418.1(g)), and the regulations elsewhere provide that the regulations "prescribe water uses within existing rights" and "do not, in any way, change, amend, modify, abandon, diminish, or extend existing rights" (43 C.F.R. 418.5).

The regulations provide for the establishment of a committee to develop operating criteria and procedures (OCAP) for each "water year" beginning on October 1 and ending on September 30. Such operating criteria are to govern the "coordinated operation and control of the Truckee and Carson Rivers in regard to the exercise of water rights of the United States" (43 C.F.R. 418.3(a)). The express purposes of the criteria and procedures are: (1) to comply with "all of the terms and provisions" of the *Orr Ditch* and *Alpine* decrees governing the use of Truckee and Carson River waters, and (2) to maximize the use of Carson River waters to satisfy the water requirements on the Newlands Project and thereby conserve Truckee River flows so as to make as much water available for Pyramid Lake as possible. 43 C.F.R. 418.3(a). The regulations also limit combined Truckee and Carson water diversions to 406,000 acre-feet per water year, "if available" (43 C.F.R. 418.4(b)), subject to possible reduction in years after 1966 as the operating criteria provide a body of water-management experience (43 C.F.R. 418.4(c)). Finally, the regulations, as promulgated in 1967 and still in effect, expressly provide that "[t]he District's [*i.e.*, petitioner's] operation of the irrigation works,

including the diversion of water, shall be in compliance with all of the terms and provisions of the [*Orr Ditch*] and the [*Alpine*] Decree[s], the rules and regulations in this part, and the operating criteria and procedures adopted by the Secretary." 43 C.F.R. 418.4(a).

Annual operating criteria and procedures thereafter were developed pursuant to the general regulations. The Secretary's 1972 operating criteria set a limit on diversions for the Newlands Project in the amount of 378,000 acre feet. 37 Fed. Reg. 19838 (1972).

3. a. In 1970, the Tribe brought an action in the United States District Court for the District of Columbia against the Secretary of the Interior. See *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972 and 1973). In subsequent proceedings, the Tribe alleged that the operating criteria for 1972 violated the Secretary's general regulations codified at 43 C.F.R. Part 418 and that the diversion of 378,000 acre-feet of water permitted by those criteria was in excess of the amount needed for the Project and reduced needed flows for Pyramid Lake. The Secretary moved to dismiss the suit for failure to join indispensable parties (the Newlands Project water users) and, in the alternative, to transfer the case to the United States District Court for the District of Nevada. The district court denied both motions.

After trial, the district court declared that the Secretary's 1972 operating criteria were unlawful. The court recognized that neither it nor the Secretary could adopt or require a regulation that would infringe upon the *Orr Ditch* and *Alpine* decrees. But the court found from the evidence that the Secretary had formulated the operating criteria for 1972 by

"totally ignoring" the 2.92 acre feet per acre in the temporary *Alpine* decree that was then in effect (see page 3, *supra*) and instead had calculated water use on the basis of the greater maximum quantities in the *Orr Ditch* decrees. 354 F. Supp. at 257. In the court's view, the evidence also established that the criteria were "wholly inadequate" to prevent waste within the petitioner District; that water could be conserved for Pyramid Lake through better management without offending existing decrees or contractual rights; and that the Secretary has the right under the 1926 Contract "to require [petitioner] to conduct its affairs in a non-wasteful manner" (354 F. Supp. at 257; see Art. 7, Pet. App. A45-A46). The court further found in this regard that "[t]he operations of [petitioner] are not tightly controlled and water is taken practically on demand without necessary safeguards to prevent improper and wasteful use," and that the absence of enforcement mechanisms in the Secretary's criteria must be considered in light of petitioner's formal statement that it would disregard even the Secretary's own criteria that were challenged by the Tribe and instead "divert water as it chooses by giving instructions to its own water masters" (354 F. Supp. 257-258).

Based on these findings, the court ordered the Secretary to submit new operating criteria by January 1, 1973, for the court's review. The Tribe also submitted proposed operating criteria, upon which petitioner commented prior to the court's determination. Tribe Supp. E.R. 211-214. On February 20, 1973, the district court issued its judgment and order (354 F. Supp. at 261-262), which approved a revision of the operating criteria (*id.* at 262-266). The Secretary did not take an appeal from this judgment (Pet. App. A8), and the Secretary published the

court-approved operating criteria in the Federal Register in March 1973. 38 Fed. Reg. 6697.

b. In accordance with the Secretary's proposal, the new operating criteria approved by the court provided for a maximum diversion of water of 350,000 acre-feet for the Project in the 1973 water year. However, the court specified a maximum diversion of 288,129 acre-feet for the Project in the 1974 water year. 354 F. Supp. at 261, 262. The latter figure was calculated on the basis of the Project's overall needs, taking into account the 2.92 afa water duty under the temporary *Alpine* decree that was then in effect for the Carson River. Tribe Supp. E.R. 211-214. The criteria also forbade any further nonirrigation diversions for the remainder of the 1973 water year (354 F. Supp. at 265); provided for establishment of a central facility to coordinate Project water deliveries and for improved methods of flow measurement at farm turnouts to be operated only by petitioner's employees (*ibid.*); and restricted delivery of Project water only to those lands for which petitioner "has in advance established to the satisfaction of the Secretary * * * that a current valid water right exists" (*ibid.*).

4. Upon publication of the new criteria, the Secretary took immediate steps to implement them. The Bureau of Reclamation established a program to monitor petitioner's operation of the Project in light of the new criteria and procedures, attempted to determine the precise lands that possessed water rights under the Project, and initiated efforts to institute a water measurement program (Gov't E.R. 35, 36, 39, 40, 42).

In June 1973, petitioner informed the Bureau of Reclamation that it intended to divert additional

Truckee River water to the Lahontan Reservoir, acknowledging that it would be in "direct violation" of the 1973 criteria (Tribe Supp. E.R. 220), even though the Project had an ample supply of water for the remainder of the year (E.R. 347). The Secretary, on June 15 and July 31, 1973, informed petitioner that it risked termination of the 1926 Contract if the violations continued (E.R. 360-361). In the face of that warning, petitioner once again, on September 10, 1973, authorized diversion of water from the Truckee River to the Lahontan Reservoir (Tribe Supp. E.R. 240). On September 14, 1973, the Secretary notified petitioner that, pursuant to Article 32 of the 1926 Contract (Pet. App. A65), he was terminating the Contract as of October 31, 1974 (E.R. 375-377). The Secretary stated that the termination was necessary due to petitioner's repeated and "willful violation of the Department's Operating Criteria and Procedures" (E.R. 377), particularly petitioner's June and September Truckee River diversions. The Secretary also cited the fact that petitioner continued to deliver water to nonwater right lands and had failed to establish an adequate measurement program (*ibid.*).

5. a. On March 18, 1974, petitioner filed this action in the United States District Court for the District of Nevada seeking an injunction barring the Secretary from terminating the 1926 Contract and a declaration that the operating criteria and procedures were invalid. The district court granted the Tribe's motion to intervene as a defendant. The court then held four days of trial in October 1979, after which the case was held in abeyance pending this Court's decision in *Nevada* v. *United States, supra,* and the Ninth Circuit's decision in *United States* v. *Alpine Land & Reservoir Co., supra.*

On August 18, 1983, the district court entered its judgment denying all of petitioner's requested relief and declaring that the Secretary legally terminated the 1926 Contract (Pet. App. A32). The court found substantial evidence that petitioner knowingly failed to comply with the 1973 operating criteria and procedures (*id.* at A14), observing that certain violations were detailed in testimony presented by a member of petitioner's own board of directors (*id.* at A13-A14).

With respect to the validity of the criteria, the district court held that the Secretary did not violate the Administrative Procedure Act by promulgating the 1973 operating criteria without following the notice and comment rulemaking provisions in 5 U.S.C. 553, because the operating criteria constituted "rules regarding public contracts" within the meaning of the exemption from such procedures in 5 U.S.C. 553(a)(2) (Pet. App. A20-A21). The court also held that the rules were within the Secretary's statutory authority that was expressly reserved in the 1926 Contract (Pet. App. A22-A24) and that the operating criteria were not arbitrary and capricious because their prior approval by the United States District Court for the District of Columbia indicated that the Secretary had considered the relevant factors and made no error of judgment and because petitioner had failed to present any evidence to the contrary (*id.* at A24). Finally, the court found the operating criteria to be enforceable by means of the termination provision in Article 32 of the 1926 Contract (*id.* at A25-A29).

The district court acknowledged that the operating criteria had been approved by the United States District Court for the District of Columbia in a suit to which petitioner and the Project water users were not parties (Pet. App. A31-A32). But the court continued (*id.* at A32):

> Whatever one may think of such a situation, it is nonetheless clear that self-help to the extent to which [petitioner] availed itself is not the remedy. It could not defy the regulations and after notification of contract termination defend upon the ground that if it had presented its case by intervention in the District of Columbia court or if it had prior to termination attacked the new regulations in a Nevada court, grounds for termination of the contract would not have existed.

b. The court of appeals affirmed (Pet. App. A1-A10). The court first held that the proceedings in the suit in the United States District Court for the District of Columbia did not deprive petitioner of any property right without due process of law. The court held in this regard that petitioner, as an irrigation district, has no water rights of its own that were affected by the District of Columbia suit and the operating criteria (Pet. App. A5-A7). The court of appeals acknowledged that the 1926 Contract did grant petitioner the right to manage the Project, but the court concluded that the District of Columbia suit did not impermissibly interfere with that right, because the 1926 Contract reserved to the Secretary the right to issue the operating criteria (*id.* at A7-A8) and those criteria were not arbitrary or capricious (*id.* at A9). Nor, the court held, did the Secretary act unlawfully in terminating the Contract, because petitioner "readily admit[ted]" that it violated the operating criteria by diverting more water in 1973 than was permitted by the criteria and because the Contract "explicitly gave the Secretary the right to terminate the contract if [petitioner] violated regulations concerning the operation of the Newlands Project" (*id.* at A9-A10).

6. After the district court rendered its decision and denied petitioner's application for a stay of the termination of the 1926 Contract pending appeal, petitioner and the United States, on February 14, 1984, entered into a Temporary Operation and Maintenance Agreement permitting petitioner to continue to operate the Project. That contract remains in effect, although it may be terminated by either party on 45 days' notice.

ARGUMENT

The decision of the court of appeals is correct and, contrary to petitioner's contention, is fully consistent with this Court's decision in *Nevada* v. *United States*, 463 U.S. 110 (1983). The district court found, and petitioner does not dispute, that petitioner knowingly defied the 1973 operating criteria in a number of respects. The 1926 Contract explicitly permitted the Secretary to terminate petitioner's management rights in such circumstances. The Secretary's decision to do so raises no questions of general importance warranting review by this Court. Even as regards the Newlands Project, petitioner's objections to the operating criteria promulgated in 1973 and to the role of the United States District Court for the District of Columbia in bringing them about are of no continuing importance, because since the certiorari petition was filed, the Secretary has proposed revised operating criteria and the original suit challenging the operating criteria has been transferred to the District of Nevada. Especially with circumstances in this fluid state and in a posture to be considered by the same district court that is responsible for administration of the *Orr Ditch* and *Alpine* decrees, there is no occasion for this Court to intervene.

1. As an initial matter, petitioner plainly errs in contending (Pet. 13-16) that the decision below is inconsistent with this Court's decision in *Nevada* v. *United States*, 463 U.S. 110 (1983), and "unsettles" vested Truckee River water rights under the *Orr Ditch* decree that were confirmed in that case.

The present case has nothing to do with anyone's right under the *Orr Ditch* or *Alpine* decree to receive a particular amount of Truckee or Carson River waters. To the contrary, as explained above (see pages 4-5, *supra*), the basic regulations promulgated in 1967, pursuant to which the annual operating criteria are issued, expressly provide that they are intended to *satisfy* decreed water rights and that those rights are unaffected by the regulations. Moreover, the judgment of the United States District Court for the District of Columbia that approved the operating criteria petitioner challenges likewise states that it does not affect the rights of any person under the *Orr Ditch* and *Alpine* decrees (354 F. Supp. at 262), and the diversion limitations in the operating criteria were calculated to satisfy the water rights as they were then in effect under the final *Orr Ditch* decree and the temporary decree in *Alpine*. See page 8, *supra*. The only issue in this case is *who*—the United States or petitioner—will operate the Newlands Project and thereby provide Project water users with the judicially decreed amounts of water to which they are entitled. The court below simply found that the Secretary of the Interior acted within the scope of his authority by: (1) promulgating regulations governing the operation of the Project, within the limits of the *Orr Ditch* and *Alpine* decrees and other restraints, in a manner that minimizes waste and maximizes the amount of Truckee River water left over to be fur-

nished to Pyramid Lake; and (ii) terminating the 1926 Contract after petitioner repeatedly refused to abide by those regulations. The court of appeals' decision therefore respects, not "unsettles," water rights confirmed in *Nevada* v. *United States*, *supra*.

There is no indication that Project water users would have received less water for their farms than that to which they were entitled under the *Orr Ditch* and *Alpine* decrees if petitioner had fully complied with the 1973 criteria that it concededly violated. So long as that obligation is met, nothing in the *Orr Ditch* and *Alpine* decrees—or in this Court's decision in *Nevada* v. *United States*—prohibits the Secretary from issuing regulations for the coordinated, economical, and nonwasteful operation of government-owned Project works on the Truckee and Carson Rivers.[2] By doing so, the United States can maximize the amount of water remaining in the Truckee River after diversions at Derby Dam necessary to satisfy Project water rights, and thereby maximize the amount of water that flows into Pyramid Lake for the benefit of the Tribe and its fishery. See *Nevada* v. *United States*, 463 U.S. at 146 n.* (Brennan, J., concurring). This Court recognized in *Nevada* v. *United States* that the United States has a continuing fiduciary obligation to the Tribe as regards the Lake and water needed for it, just as the United States

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[2] Indeed, the *Orr Ditch* decree itself specifically provides that the water rights were decreed to the United States for irrigation on the Newlands Project and for other purposes, "under such control, disposal and *regulation* as the [United States] may make or desire" (E.R. 38 (emphasis added)). Although the United States has sold the right to use water from the Project to individual farmers, that action does not affect the right of the United States to regulate the operation of the Project itself.

has an obligation to satisfy the decreed water rights of Project water users (463 U.S. at 127). Moreover, the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, now also empowers the Secretary to protect the fish in Pyramid Lake within the limits of existing authorities. See *Carson-Truckee Water Conservancy Dist.* v. *Clark*, 741 F.2d 257 (9th Cir. 1984), cert. denied, No. 84-808 (Mar. 25, 1985).[3]

2. a. Quite aside from the matter of vested water rights, petitioner challenges the validity of the operating criteria (see Pet. 22-27) and the role of the United States District Court for the District of Columbia in bringing them about (see Pet. 18-22). However, these issues are of no continuing importance in light of events that have transpired since the certiorari petition was filed.

First, on March 29, 1985, the United States District Court for the District of Columbia granted the

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[3] Contrary to petitioner's contention (Pet. 14-15), this Court's holding in *Nevada* v. *United States*—that the doctrine of res judicata bars the United States and the Tribe from obtaining a judicial declaration of a right to water for fishery purposes as against the previously decreed water rights of Project water users—does not prevent the Secretary from taking steps to prevent wasteful practices and to make available for Pyramid Lake any water that is *not* needed to satisfy the vested rights of Project water users under the *Orr Ditch* decree. Neither *Orr Ditch* nor *Nevada* v. *United States* gave Project water users, much less petitioner, a right to continue to receive water in excess of the amount decreed. And neither *Orr Ditch* nor *Nevada* v. *United States* bars the Tribe from receiving more water than that actually decreed to it for irrigation purposes in *Orr Ditch*, so long as other decreed rights are not adversely affected. If the rule were otherwise, not a drop of water would be permitted to reach Pyramid Lake, the terminus of the Truckee River. This Court plainly did not intend that drastic consequence.

Secretary's motion to transfer the *Pyramid Lake Paiute Tribe* v. *Morton* suit to the District of Nevada. As a result, either petitioner or individual Project water users now have the opportunity to intervene and participate in a convenient forum in any further proceedings that may ensue in that case. Significantly, moreover, the United States District Court for the District of Nevada also has jurisdiction to administer and construe the *Orr Ditch* and *Alpine* decrees, so the potential for conflicting judicial interpretations and orders concerning those decrees and other matters, about which petitioner has complained in the past, should no longer arise.

Second, on February 12, 1985, the Secretary published, in proposed form, detailed new operating criteria to govern the Newlands Project and the Truckee and Carson River Basins for 1985. 50 Fed. Reg. 5934-5947.[4] The new proposal, like the prior criteria and regulations, stresses that the criteria must "provid[e] the legal water entitlement to each water right holder on the Newlands Project" under the *Orr Ditch* and *Alpine* decrees, but that "[s]ome discretion * * * is allowed in translating water duties into a total annual diversion for the project and developing operating criteria." 50 Fed. Reg. 5934 (1985). Against this background, the stated purposes of the new criteria are: "[t]o achieve efficient water management techniques; to implement equitable operating procedures for the Project * * *; and to ensure that irrigation and other water uses receive the water to which these uses are entitled under ap-

[4] On March 22, 1985, the Interior Department also proposed a corresponding revision of the basic regulations in 43 C.F.R. Part 418, pursuant to which the annual operating criteria are issued. 50 Fed. Reg. 11515 (1985).

plicable court decrees, and that water in excess of such entitlements is not diverted at Derby Dam or released from Lahontan Dam." *Ibid.* Public hearings have been held on the proposed criteria; the comment period has now closed; and those criteria can be expected to be published in final form in the near future. In addition, on March 19, 1985, the Secretary established interim operating criteria to govern the Project until the final criteria are approved.

As a result of these developments, the 1973 operating criteria that petitioner challenges in this suit will have no prospective application, and any dispute regarding their application to Project water users is therefore now essentially moot. Nor does petitioner's contention that the 1973 criteria were unlawful because of the role of the United States District Court for the District of Columbia have any application to these new criteria, because the Department of the Interior took the initiative in formulating them and they unquestionably reflect the exercise of that Department's own judgment and discretion. Moreover, if petitioner or Project water users have any remaining objections to the new criteria after they are published in final form, they may challenge those criteria in the United States District Court for the District of Nevada, since the *Pyramid Lake Paiute Tribe* v. *Morton* suit has been transferred there.[5] In the meantime, pursuant to the interim contract entered into in February 1984 (see page 12, *supra*), petitioner continues to operate the Newlands Project, as it has done since the termination notice was sent in 1973.

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[5] Judicial approval of the new criteria may be required under the judgment in *Pyramid Lake Paiute Tribe* v. *Morton*. If the district court declines to approve them, any party aggrieved presumably would be entitled to take an appeal.

There accordingly is no need for this Court to intervene in the ongoing and complex process of harmonizing the various rights and interests in the Truckee and Carson River Basins.

b. In any event, petitioner's contention (Pet. 22-27) that the Secretary has no authority to issue regulations and criteria for the coordinated and efficient operation of the Newlands Project is completely without merit. Section 10 of the Reclamation Act of 1902, pursuant to which the Newlands Project was constructed, expressly authorizes the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this Act into full force and effect." 43 U.S.C. 373. Section 8 of the same Act provides that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. 372. These provisions plainly authorize the Secretary to issue regulations to prevent waste, which is not a "beneficial use" permitted by Section 8, and to "limit" the amount of water diverted and released for irrigation to only the amount necessary to satisfy Project water rights.

Moreover, Article 7 of the 1926 Contract between petitioner and the United States required petitioner to operate the Project in accordance with "the rules and regulations of the Secretary [then] in force or [t]hereafter promulgated" and to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water" (Pet. App. A45-A46). Similarly, in Article 34 of the Contract, the Secretary reserved the right "to make reasonable rules and regulations * * * as may be deemed proper

and necessary to carry out the true intent and meaning of the law and of this contract," and petitioner in turn agreed "that in the operation of the transferred works, all such rules and regulations will be fully adhered to" (Pet. App. A66). Thus, the 1926 Contract reserved to the Secretary the authority to promulgate regulations not only to implement the reclamation laws, but also to carry out the intent of the Contract itself. The latter authority necessarily includes the authority to issue regulations to carry out petitioner's contractual obligation under Article 7 to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water." Finally, under Article 12 of the 1926 Contract, any land owner who accepts Project water is deemed to have consented to the provisions of the Contract and to have waived any and all objection thereto (Pet. App. A52-A53). By virtue of the foregoing Contract provisions, both petitioner and individual Project water users have agreed to the Secretary's issuance of the very sort of regulations and operating criteria that petitioner has challenged in this suit.

The Secretary's actions also are consistent with the background of legislation passed by Congress contemporaneous to the 1926 Contract. As recited in Article 1 (Pet. App. A42), the 1926 Contract was entered into pursuant to, inter alia, the Omnibus Adjustment Act of 1926, ch. 383, 44 Stat. 636 *et seq.* Section 23 of that Act (44 Stat. 641) excused water users on the Newlands Project from payment of certain costs of the Project, and Section 45 (44 Stat. 648) provided for the extension of the period for repayment by water users of construction costs of a reclamation project if an irrigation district assumed liability for those charges. The Omnibus Adjustment

Act of 1926 in response to the Fact Finders Report, which detailed the various difficulties then confronting the reclamation program. One such problem addressed by the Fact Finders was the wasteful use of water on reclamation projects. S. Doc. No. 92, 68th Cong., 1st Sess. 76-79 (1924). The Fact Finders recommended that, "if necessary, compulsory steps should be taken to prevent the excessive use of water in irrigation, as a means of making the water user protect himself against his own wasteful practices." *Id.* at 78. The provision in the 1926 Contract requiring petitioner to ensure the economical and beneficial use of irrigation water accords with that recommendation.

c. Petitioner's challenge to the operating criteria on the basis of the role of the United States District Court for the District of Columbia in formulating them (Pet. 18-22) also is without merit. Petitioner's objection is that the criteria were formulated by that court in 1973 "over the objection of the Executive" (Pet. 18) and that they therefore do not reflect an exercise of discretion by the Secretary. However, whatever the merits of that objection might have been had it been pursued (either by the Secretary or petitioner) in the *Pyramid Lake Paiute Tribe* v. *Morton* suit itself in 1973, that issue is not appropriate for review at the behest of the petitioner in these separate proceedings many years later.

The judgment in *Pyramid Lake Paiute Tribe* v. *Morton* was not appealed by the government. The Interior Department accordingly published the criteria approved in that suit in March 1973, and the Department thereafter made clear that it would enforce them against petitioner. See pages 8-9, *supra*. By this action, the criteria became, in contemplation of law, the Secretary's criteria. Accordingly, under the

provisions of the 1926 Contract discussed above, petitioner was obligated to follow them.[6] If petitioner did not believe that the criteria were substantively valid, it presumably could have challenged them promptly in an appropriate district court and perhaps sought a preliminary injunction barring their enforcement pending a final resolution. But neither petitioner nor Project water users followed that course. Petitioner instead resorted to self-help through outright defiance of the criteria, despite its express agreement in the 1926 Contract that such regulations would be "adhered to" in the operation of the Project and despite repeated warnings by the Department of the Interior that such defiance could lead

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[6] Petitioner notes (Pet. 7, 20) that the Department of the Interior favored appeal in *Pyramid Lake Paiute Tribe* v. *Morton* (Pet. App. A106-A107), but that the Department of Justice decided not to appeal (Pet. App. A108). That background has no relevance here. By statute, Congress has directed the Attorney General and the Solicitor General to control litigation such as this (28 U.S.C. 516, 519), and the Department of Justice exercised that authority with full knowledge that the consequence would be that the court-approved operating criteria would be implemented. Thus, for whatever reason, the responsible officials were prepared to accept, on behalf of the Executive Branch, the criteria petitioner challenges. Any difference of views within the Executive Branch that preceded that determination has no bearing on *petitioner's* obligation to adhere to the criteria that concededly were promulgated by the Secretary after the decision was made not to appeal. Petitioner's challenge to the operating criteria on the ground discussed in this footnote therefore is, in substance, a collateral attack on the Attorney General's determination not to take an appeal in *Pyramid Lake Paiute Tribe* v. *Morton* in 1973. That determination, however, was committed to the discretion of the Executive. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).

to termination of the Contract. Petitioner cannot now avoid the termination of the 1926 Contract that it virually invited by attempting to impeach the Secretary's issuance of operating criteria that otherwise are substantively valid, as both courts below held.[7]

3. Finally, petitioner contends (Pet. 27-28) that the Secretary's actions interfere with its rights under the Truckee River Agreement. The court of appeals correctly disposed of this issue, and it presents no question of general importance warranting review by this Court. As the court of appeals observed, the Truckee River Agreement, as incorporated in the *Orr Ditch* decree, gave petitioner "the right to dispose of a portion of the diverted flow of the Truckee River that reached Derby Dam. It did not give [petitioner] any property rights in the flow" (Pet. App. A7). There is nothing to prevent the Secretary, after satisfying decreed water rights held by Project farmers, from prohibiting use of the federally owned facilities for the transportation of water not needed to satisfy those decreed water rights.

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[7] Petitioner's contention (Pet. 16-18) that it has standing to represent the interests of Project water users is beside the point for the same reason. The authority of petitioner, in a *representative* capacity, to vindicate the interests of Project water users in a lawsuit under some circumstances (which we may assume for present purposes) does not give it the authority in its *managerial* capacity under the 1926 Contract to defy rules and regulations promulgated by the Secretary. For this reason, petitioner cannot avoid termination of the 1926 Contract by reference to the water rights of Project water users. Moreover, the rights of Project water users were exactly the same after termination as they were before, so the termination of petitioner's right to manage the Project raises no due process issue regarding the interests of Project water users that would, in turn, be presented by petitioner in this suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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